AMDB Factoring Sdn Bhd (formerly known as Arab-Malaysian Enterprises Sdn Bhd) v Iszajaya Sdn Bhd & Ors

HIGH COURT (KUALA LUMPUR) — SUIT NO D5-22-395 OF 1995
KAMALANATHAN RATNAM JC
12 FEBRUARY 1997

Civil Procedure *— Res judicata — Different cause of action and issues — Judgment in default entered against different defendants and arose out of distinct and separate causes of action — Whether plaintiff was estopped from commencing the action — Whether there was duplicity of actions*

By a factoring agreement dated 24 November 1994 ('the agreement'), the plaintiff had agreed to factor and be assigned the debts and invoices (the debt receivables) due to the first defendant from one Sistem Kenderaan Negara Sdn Bhd ('SKN'). The second and third defendants were the guarantors pursuant to a letter of guarantee and indemnity executed in order to secure the agreement.

Upon the default of SKN, the plaintiff, pursuant to cl 15 of the agreement, sent a notice to the first defendant, requiring the first defendant to repurchase the debts outstanding from SKN. Notices of demand were also issued to the second and third defendants as well as SKN. The plaintiff claimed against the defendants jointly and severally for the outstanding sum together with interest and factoring charge. However, having commenced this action ('the D5 suit'), the plaintiff also commenced a civil suit against SKN vide Kuala Lumpur High Court Civil Suit No D2-22-632-1995 ('the D2 suit') in which default judgment was entered against it.

By consent, three issues arose for determination, namely: (i) whether the plaintiff was entitled to commence this suit in the light of the D2 suit, that is, on the ground of duplicity; (ii) whether res judicata applies; and (iii) if res judicata applied, was the plaintiff estopped from proceeding with this case since judgment in default had been entered in respect of the D2 suit.

Held, judgment against the first, second and third defendants jointly and severally:

(1) On the first issue, as the present D5 suit was in respect of different defendants and also arose out of distinct and separate causes of action from the D2 suit, there was no reason why the plaintiff was not entitled to commence the D5 suit. Clause 15 of the factoring agreement was clearly enforceable against the first defendant (see pp 406B–H, 407I and 408A); *Amanah Factors Sdn Bhd (formerly known as Chem Credit Sdn Bhd) v Polycom Enterprise Sdn Bhd & Ors* [1994] 1 CLJ 121 and *Re Charge Card Service Ltd* [1986] 3 All ER 289 followed.

(2) Since cl 1 of the guarantee stipulated that the second and third defendants were to jointly and severally guarantee, undertake and agree irrevocably and unconditionally not merely as sureties but as principal debtors to pay the plaintiff on demand all monies due from the first defendant pursuant to the factoring agreement, the guarantee was enforceable against the second and third defendants and there was nothing to disentitle the plaintiff from commencing the present D5 suit against them (see p 408E–F); *Chong Yoong Choy v UOL Factoring Sdn Bhd* [1996] 1 MLJ 421 followed.

(3) On the second and third issues, since the defendants in the present suit were not the same as in the D2 suit and neither was one the privy of the other, and as the cause of action and the issues in the present suit were different from those in the D2 suit, the issue of estoppel giving rise to an estoppel simply did not arise (see p 409F–G); *Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd* [1995] 3 MLJ 189 followed and *Wong Peng Yan Benjamin v Genting Bhd & Anor* [1993] 3 MLJ 713 distinguished.

(4) On the evidence, the default judgment against SKN in the D2 suit did not involve judicial determination of the matter in issue between the parties therein. This was another factor that militated against the application of res judicata to the present case (see pp 409H–I and 410A–B); *Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd* [1995] 3 MLJ 189 followed.

[Bahasa Malaysia summary

Melalui suatu perjanjian pemfaktoran bertarikh 24 November 1994 ('perjanjian tersebut'), plaintif telah bersetuju untuk memfaktorkan dan diserahhakkan hutang-hutang dan invois-invois (hutang yang boleh diterima) yang terhutang kepada defendan pertama dari Sistem Kenderaan Negara Sdn Bhd ('SKN'). Defendan-defendan kedua dan ketiga adalah penggerenti-penggerenti menurut suatu surat gerenti dan tanggung rugi yang disempurnakan untuk menjamin perjanjian tersebut.

Atas kemungkiran SKN, plaintif, menurut fasal 15 perjanjian tersebut, telah menghantar suatu notis kepada defendan pertama, menghendaki defendan pertama membeli kembali hutang-hutang yang belum dilunaskan itu dari SKN. Notis-notis tuntutan telah juga dikeluarkan kepada defendan-defendan kedua dan ketiga serta SKN. Plaintif telah menuntut terhadap defendan-defendan secara bersesama dan berasingan untuk jumlah yang belum dilunaskan serta faedah dan bayaran pemfaktoran. Namun begitu, setelah memulakan tindakan ini ('guaman D5'), plaintif juga telah memulakan suatu guaman sivil terhadap SKN melalui Guaman Sivil No D2–22–632–1995 Mahkamah Tinggi Kuala Lumpur ('guaman D2') dalam mana penghakiman ingkar telah dimasukkan terhadapnya.

Dengan persetujuan, tiga isu berbangkit untuk diputuskan, iaitu: (i) sama ada plaintif adalah berhak untuk memulakan guaman ini

memandangkan guaman D2, yakni, atas alasan pertindihan; (ii) sama ada res judicata terpakai; dan (iii) jika res judicata terpakai, adakah plaintif diestopkan dari meneruskan kes ini oleh kerana penghakiman ingkar telah dimasukkan dalam hal guaman D2. A

Diputuskan, penghakiman terhadap defendan-defendan pertama, kedua dan ketiga bersesama dan berasingan: B

(1) Atas isu pertama, oleh sebab guaman D5 sekarang adalah mengenai defendan-defendan yang berlainan dan juga berbangkit dari kausa-kausa tindakan yang berbeza dan berasingan dari guaman D2, tiada sebab mengapa plaintif tidak berhak untuk memulakan guaman D5. Fasal 15 perjanjian tersebut jelas boleh dikuatkuasakan terhadap defendan pertama (lihat ms 406B–H, 407I dan 408A); *Amanah Factors Sdn Bhd (formerly known as Chem Credit Sdn Bhd) v Polycom Enterprise Sdn Bhd & Ors* [1994] 1 CLJ 121 dan *Re Charge Card Service Ltd* [1986] 3 All ER 289 diikut. C D

(2) Oleh kerana fasal 1 gerenti tersebut menetapkan bahawa defendan-defendan kedua dan ketiga bersesama dan berasingan menggerenti, mengakujanji dan bersetuju tanpa boleh ditarikbalik dan tanpa syarat bukan sahaja sebagai sureti tetapi sebagai penghutang-penghutang prinsipal untuk membayar plaintif atas tuntutan kesemua wang yang kena dibayar dari defendan pertama menurut perjanjian pemfaktoran tersebut, gerenti tersebut boleh dikuatkuasakan terhadap defendan-defendan kedua dan ketiga dan tidak ada apa-apa yang menafikan hak plaintif dari memulakan guaman D5 kini terhadap mereka (lihat ms 408E–F); *Chong Yoong Choy v UOL Factoring Sdn Bhd* [1996] 1 MLJ 421 diikut. E F

(3) Atas isu-isu kedua dan ketiga, oleh kerana defendan-defendan dalam guaman sekarang tidak sama dengan yang dalam guaman D2 dan kedua-duanya bukanlah privi kepada yang lain, dan oleh kerana kausa tindakan tersebut dan isu-isu dalam guaman sekarang adalah berlainan dari yang dalam guaman D2 tersebut, isu estopel yang membangkitkan sesuatu estopel tidak berbangkit (lihat ms 409F–G); *Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd* [1995] 3 MLJ 189 diikut dan *Wong Peng Yan Benjamin v Genting Bhd & Anor* [1993] 3 MLJ 713 dibeza. G

(4) Atas keterangan, penghakiman ingkar terhadap SKN dalam guaman D2 tidak membabitkan pemutusan kehakiman terhadap perkara yang menjadi isu antara pihak-pihak dalamnya. Ini adalah satu lagi faktor yang menghalang pemakaian res judicata kepada kes sekarang (lihat ms 409H–I dan 410A–B); *Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd* [1995] 3 MLJ 189 diikut.] H I

Notes

For cases on res judicata, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 2892–2939.

Cases referred to

Amanah Factors Sdn Bhd (formerly known as Chem Credit Sdn Bhd) v Polycom Enterprise Sdn Bhd & Ors [1994] 1 CLJ 121 (folld)

Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd [1995] 3 MLJ 189 (folld)

Charge Card Service Ltd, Re [1986] 3 All ER 289 (folld)

Chong Yoong Choy v UOL Factoring Sdn Bhd [1996] 1 MLJ 421 (folld)

Hong Leong Leasing Sdn Bhd v Far East Knitting Sdn Bhd [1996] 1 MLJ 421 (refd)

Khaw Poh Chhuan v Ng Gaik Peng & Ors [1996] 1 MLJ 761 (refd)

Wong Peng Yan Benjamin v Genting Bhd & Anor [1993] 3 MLJ 713 (distd)

KG Tan (*M Wong* with him) (*Zairina Loh & Wong*) for the plaintiff.

Zainul Rijal bin Abu Bakar (*Anir Asree Meor Nordin* with him) (*Zainul Rijal & Associates*) for the defendants.

Kamalanathan Ratnam JC: In this action, the plaintiff claims against the defendants jointly and severally the sum of RM290,462.34 together with interest at the rate of 11.5% pa commencing from 27 June 1995 until full realization and the sum of RM4,800 pa as minimum factoring charge commencing from 27 June 1995 until full realization and costs.

The plaintiff entered into a factoring agreement dated 24 November 1994 ('the agreement') with the defendants whereby the plaintiff had agreed to factor and be assigned the debts and invoices (the debt receivables) due to the first defendant from one Sistem Kenderaan Negara Sdn Bhd ('SKN'). The second and third defendants executed a letter of guarantee and indemnity dated 24 November 1994 to secure the factoring agreement. SKN was notified of the agreement by the first defendant by notice dated 24 November 1994. However, SKN defaulted in payment when the invoices became due. As no payment was forthcoming from SKN, the plaintiff exercised its rights under the agreement (cl 15) requiring the first defendant to repurchase the debts outstanding from SKN. The requisite notice under cl 15 was sent to the first defendant. The plaintiff caused their solicitors to issue a notice of demand to all three defendants as well as to SKN. Having commenced this action ('the D5 suit'), the plaintiff also commenced proceedings against SKN by way of Kuala Lumpur High Court Civil Suit No D2–22–632 of 1995 dated 18 October 1995 ('the D2 suit'). Since the factual basis of the plaintiff's claim had been agreed to in the statement of agreed facts dated 22 June 1996, by consent of the parties, three issue arose for determination by me, namely:

(1) Whether the plaintiff is entitled to commence this suit in the light of the D2 suit, that is, on the ground of duplicity.

(2) Whether res judicata applies in this case.

(3) If res judicata applies, is the plaintiff estopped from proceeding with this case since judgment in default has been entered in respect of the D2 suit.

Since the burden was on the defence, I directed the defendants to submit first. A

Whether the plaintiff is entitled to commence this suit in the light of the D2 suit

Having considered the submissions of both parties, it is obvious that the D5 suit is in respect of different defendants and also arose out of separate causes of action. The claim against the first defendant herein is brought pursuant to cl 15 of the agreement which provides as follows: B

> If:
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> (i) any customer shall dispute the validity of or the amount payable in respect of a purchased debt; or C
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> (ii) any customer shall institute proceedings or rescind or claim damages for breach of any contract under which a purchased debt arises; or
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> (iii) any customer makes a counterclaim or set-off in answer to a claim for a purchased debt; or
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> (iv) without obtaining the factor's prior written consent, the client waives or modifies any terms of the contract with the customer in respect of a purchased debt; or D
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> (v) the client commits a breach of any term of the contract with a customer in relation to a purchased debt; or
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> (vi) the client commits a breach of any term of this agreement or of any contract arising from acceptance of an offer; or E
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> (vii) any customer becomes insolvent; or
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> (vi) any customer fails promptly to pay a debt when it becomes due;
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> the factor may in its discretion at any time after such event without limitation of other rights available to it hereunder, give the client written notice requiring the client to repurchase the factor's interest in any debt or portion F of any debt owed to the client by such customer which the factor may have purchased from the client and upon receipt of such notice, the client shall be bound to purchase that interest from the factor and in consideration therefor shall forthwith pay to the factor the amount by which the monies (if any) paid to the client in relation to such debts or portion of a debt plus the factoring charge exceeds the total amount received by the factor in or G towards settlement of the debt together with all other charges due to the factor under this agreement in respect thereof and upon such payment being made, and upon receipt of the factor's written request, the factor shall at the client's expense re-assign the debt to the client. The client furthermore hereby agrees to indemnify and keep the factor indemnified against any loss, damage, costs and expenses suffered or incurred by the factor as a result of H any of the matters aforesaid occurring.

However, the claim against the second and third defendants herein is founded on the guarantee of which they are liable as principal debtors. On the other hand, the plaintiff's claim against SKN in the D2 suit is in respect of debts which are assigned to the plaintiff and of which notice has I already been given to SKN. I had, in *Hong Leong Leasing Sdn Bhd v Far East Knitting Sdn Bhd* [1996] 1 MLJ 421, discussed a similar cause of action as in the D2 suit wherein I had also considered all the cases referred

to by the defendants in their submission. In respect of the cause of action against the first defendant, I can do no better than to refer to *Amanah Factors Sdn Bhd (formerly known as Chem Credit Sdn Bhd) v Polycom Enterprise Sdn Bhd & Ors* [1994] 1 CLJ 121 where a similar provision as in cl 13 appeared and James Foong J held at pp 122–123:

> However, if the plaintiffs wish to seek recourse from the first defendant, it must request the first defendant to repurchase these 'purchased debts' under cl 13 of the factoring agreement.
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> Clause 13 of the factoring agreement provides particularly that in the event of non-recovery of the 'purchased debts', the first defendant must repurchase them from the plaintiffs together with certain charges levied by the plaintiffs. However, these mandatory repurchases must be by way of written notice from the plaintiffs to the first defendant.

Also in *Re Charge Card Service Ltd* [1986] 3 All ER 289 (affirmed by the Court of Appeal in [1988] 3 All ER 702) Millett J, whilst dealing with two separate but related questions, discussed a similar clause (as cl 15) in a factoring agreement. In that case, cl 3(a) of the factoring agreement provided that:

> Commercial credit may at any time by notice in writing require the company to repurchase any receivable in certain specified events, for example if the debtor should dispute that receivable is due or valid in whole or in part, or if he should become insolvent or bankrupt.

However, in the present case, the requisite notice was given to the first defendant.

I am at a loss as to why the defendants have spent considerable time and effort to submit on the legality of the assignment between the first defendant and the plaintiff. I find that this is not an issue as agreed in the present case. In any case, the question of assignment, if at all is to be relevant, will only arise in the D2 suit between the plaintiff and SKN. Be that as it may, the defendants had in their submission conceded that there is an equitable assignment. In *Khaw Poh Chhuan v Ng Gaik Peng & Ors* [1996] 1 MLJ 761, Peh Swee Chin FCJ held, inter alia, that an absolute assignment, even if it fails to comply with s 4(3) of the Civil Law Act 1956, is valid in equity against the assignor. In a very recent decision, Gopal Sri Ram JCA said in *Chong Yoong Choy v UOL Factoring Sdn Bhd* [1996] 1 MLJ 421 at p 424:

> In *Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd & Ors* [1995] 3 MLJ 331, the Federal Court dealt with the nature, purport and legal effect of factoring agreements. It is not necessary for us to repeat all that was said in that case. Suffice to say that that was a case in which the doctrine of estoppel was invoked to lend commercial efficacy to a factoring agreement. The facts of the present case also come within the broad purview of that doctrine, and we are of the view that a different principle does not apply merely because the appellant is the guarantor of the debt and not the debtor himself.

On the issue of duplicity of action, I find that cl 15 of the agreement is clearly enforceable. The defendants have never contended otherwise; and

upon it rests the plaintiff's claim as against the first defendant. Since it is a distinct and separate cause of action altogether from the D2 suit, there is no reason why the plaintiff is not entitled to commence this present D5 suit.

In respect of the second and third defendants, there is no submission by counsel for the defendants on the said guarantee which is the basis of the plaintiff's claim against the second and third defendants. I can do no better than to rely on *Chong Yoong Choy* where Gopal Sri Ram JCA said at p 424:

> The answer to counsel's second argument is to be found in the very guarantee which his client executed. Under cl 1 of that document, the appellant expressly undertook the obligations of a principal debtor. So it really does not matter what happened between the assignor (Prebore) and the debtor (Gunung Mewah). As far as the respondent is concerned, it entered into the factoring arrangement, encouraged, no doubt, by the appellant's promise to play the role of surety as well as principal debtor, thereby assuring the respondent that he would answer the debtor's default.
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> Ought the appellant, having so encouraged the respondent to act, be permitted now to assert that the promise he gave, and upon the strength of which the respondent acted, is unenforceable for any number of reasons? We believe that justice and conscience move for a negative response to that question. It would, in our judgment, be entirely inequitable and unconscionable to permit the appellant to pursue such a course.

Since cl 1 of the guarantee stipulates that the second and third defendants do jointly and severally guarantee, undertake and agree irrevocably and unconditionally not merely as sureties but as principal debtors to pay plaintiff on demand all monies due from the client (the first defendant) pursuant to the said agreement, the effect of the decision of Gopal Sri Ram JCA in *Chong Yoong Choy* must prevail. The guarantee is thus enforceable against the second and third defendants and there is nothing to disentitle the plaintiff from commencing this suit against them.

Whether res judicata applies in this case

If so, is the plaintiff estopped from proceeding with this case since judgment in default has been entered in respect of the D2 suit

In *Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd* [1995] 3 MLJ 189, the Federal Court explained the principle thus at pp 197–198:

> What is res judicata? It simply means a matter adjudged, and its significance lies in its effect of creating an estoppel *per rem judicatum*. When a matter between two parties has been adjudicated by a court of competent jurisdiction, the parties and their privies are not permitted to litigate once more the res judicata, because the judgment becomes the truth between such parties, or in other words, the parties should accept it as the truth; *res judicata pro veritate accipitur*. The public policy of the law is that, it is in the public interest that there should be finality in litigation — *interest rei publicae ut sit finis litium*. It is only just that no one ought to be vexed twice for the same cause of action — *nemo debet bis vexari pro eadem causa*. Both maxims are the rationales for the doctrine of res judicata, but the earlier maxim has the further elevated status of a question of public policy.

A His Lordship Peh Swee Chin FCJ in delivering the judgment of the court said at pp 198–200:

> Thus, there are in fact two kinds of estoppel *per rem judicatum*. The first type relates to cause of action estoppel and the second, to issue estoppel, which is a development from the first type.
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> B The cause of action estoppel arises when rights or liabilities involving a particular right to take a particular action in court for a particular remedy are determined in a final judgment and such right of action, ie the cause of action, merges into the said final judgment; in layman's language, the cause of action has turned into the said final judgment. The said cause of action may not be relitigated between the same parties because it is res judicata.
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> On the other hand, the issue estoppel literally means simply an issue which a party is estopped from raising in a subsequent proceeding. However, the issue estoppel, in a nutshell, from a consideration of case law, means in law a lot more, ie that neither of the same parties or their privies in a subsequent proceeding is entitled to challenge the correctness of the decision
> D of a previous final judgment in which they, or their privies, were parties. This sounds like explaining a truism, but it is the corollary from that statement that is all important and that could have given birth to the controversies alluded to above; the corollary being that neither of such parties will be allowed to adduce evidence or advance any argument to contradict such decision. In this respect, we respectfully agree with Peter
> E Gibson J in *Lawlor v Gray* [1984] 3 All ER 345 at p 350, who said: 'Issue estoppel ... prevents contradiction of a previous determination, whereas cause of action estoppel prevents reassertion of the cause of action.'

It is to be noted that in the present case, the defendants are not the same as the defendants in the D2 suit. Neither is one the privy of the other.
F Moreover, it is my finding that the cause of action in the present suit is distinct and separate from that in the D2 suit. Likewise, the issues in this D5 suit are different form the issues in the D2 suit. Therefore, the issue of res judicata giving rise to an estoppel simply does not arise. The defendants relied on *Wong Peng Yan Benjamin v Genting Bhd & Anor* [1993] 3 MLJ 713
G to support their contention that res judicata would apply in this case. To my mind, that case can be easily distinguished on the principle of agency. Abdul Malek Ahmad J (as he then was) held that as it was not disputed that the second defendant was the registrar and agent of the first defendant, the liability of the first and second defendants had merged.

Another factor that militates against the application of res judicata to
H this case is that, a default judgment had been entered against the defendant SKN in the D2 suit. In so far as a default judgment is concerned and whether such a judgment could give rise to the doctrine of res judicata, I rely on *Asia Commercial Finance*'s case wherein Peh Swee Chin FCJ said at p 198:

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> If may be of interest to point out that one of the exceptional special cases is the effect of a default judgment in subsequent proceedings between the same parties, a default judgment is different from a final judgment on the merits, the latter is the category to which the judgment in the said originating motion given before the filing of the action as concerned directly herein below belongs. Please see the finer points of law in regard to default

judgments from the position of the doctrine of res judicata in *Kok Hoong v Leong Cheong Kweng Mines Ltd* [1964] MLJ 49. We have thus mentioned this question of default judgment in passing as it has sometimes been a small source of confusion to the litigants.

On the evidence, I find that there has been no judicial determination of the matter in issue between the parties in the D2 suit. In the circumstances, I hold that the defendants had failed to discharge their burden in respect of the second and third issues.

Having thus analysed the submissions and all the authorities relied upon by both counsel, I entered judgment for the plaintiff against the first, second and third defendants jointly and severally for the amount as claimed in the statement of claim together with interest and costs to be taxed or agreed.

Plaintiff's claim allowed.

Reported by Yong Yuan Kea